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1864
REPORT OF CERTAIN MEMBERS

OF THE

THE
COMMISSION ON ~~PETIGRU'S~~ CODE

OF THE

STATUTE LAW OF SOUTH CAROLINA,

PREPARED BY THE LATE

JAMES LOUIS PETIGRU, COMMISSIONER.

COLUMBIA, S. C.:

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1864.

TEXT

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CONFIDENTIAL

SECRET

With the regards of
H. A. Adams

REPORT

OF CERTAIN MEMBERS OF THE COMMISSION ON PETIGRU'S
CODE OF THE STATUTE LAW OF SOUTH CAROLINA, PRE-
PARED BY THE LATE JAMES LOUIS PETIGRU, COMMIS-
SIONER.

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The undersigned respectfully dissent from the Report of the *Majority of the Commission, and submit the following Report:

In the year 1859, an Act was passed providing for a Code of the Statute Law of the State, entrusting the work to a single Commissioner, with the aid of assistants of his own selection, and attaching a higher salary to the office than that received by any other State officer. These and other provisions of the law, as well as the importance and difficulty of the work, indicate that a person of extraordinary capabilities was contemplated for the place of Commissioner. The choice of the Legislature fell on Mr. Petigru, of whose eminent talents, reputation as a jurist, rare scholarship, general learning, high character, and indomitable industry, it is needless to speak.

The Act placed no restriction as to time on the work, but provided for an annual report of its progress, and the annual election of the Commissioner.

At the session of December, 1860, the Commissioner made his first Report, accompanied by a printed volume of 270 pages, containing "a *Redaction* of the Statute Law, under the heads of Territorial Rights, and Political and Civil Divisions, as far as Courts of Common Pleas and General Sessions, inclusive," and disclosing fully his plan, as "borrowed from Blackstone's Commentaries."

This Report was referred to the Committee on the Judiciary of each Branch of the Legislature, neither of which Committees expressed a word of disapproval of the plan of the work or the manner of its execution. And Mr. Petigru was re-elected Commissioner.

With this implied sanction of his plan, the Commissioner devoted himself with renewed energy to the prosecution of the work, and in December, 1861, submitted his second Report, and a second printed volume, both of which were referred to the same Committees, with the same result.

*The Commission consists of seven members. Only five attended the meetings. Three of them unite in the Report here called the Report of the Majority. They constitute a majority of those present, but not of the entire Commission.

Mr. Petigru was continued as Commissioner, and in December, 1862, made his third Report, accompanied by a printed volume completing the work—in which he remarks that “some errors have probably escaped him, for even in Dr. Cooper’s compilation [of the Statutes at Large of the State] omissions and mistakes have been detected, which are much more likely to occur in a Digest involving the exercise of selection than in a mere compilation. Many such errors have been corrected in the progress of the work, and form the subject of an Appendix. No inconsiderable share of that part of the present number is occasioned by contemporary legislation, and he (the Commissioner) is somewhat consoled for the bulk of this part of his work, [filling 26 pages,] by the consideration that the *Corrigenda & Addenda* to Chitty and Beavan’s Statutes of Practical Utility occupy one hundred and twenty pages of their last volume. With a grateful sense of the confidence of the Legislature, and an earnest desire that his work may be found worthy of their approval, it is submitted to their judgment.”

The entire work was then referred to a Commission of seven persons, composed of members of the Judiciary Committees of the two Houses, who, with one or two exceptions, had been members of those Committees from the time the Commissioner received his first appointment. The Commission were to “*examine and report on the work*” at the next session, and the time was afterwards extended to the present Session.

Mr. Petigru was justly anxious to appear before the Commission. For more than two years, disease, in no degree dimming his bright intellect or hindering his great energy, had been making steady inroads on his bodily frame, and death, now palpably before him, was the subject of calm contemplation. There was no record of his unsurpassed forensic efforts. This work was to be his monument, as well as a legacy to his native State, which he loved with a devotedness that no differences of opinion, and no outside attractions or enticements could extinguish or diminish. There might be apparent imperfections in it, which he could explain. One opportunity, and another, was cheerfully accorded to him. But it was too late, and his earthly career of great usefulness, and of priceless example to his young countrymen, was terminated in March, 1863.

This statement is necessary to the consideration of the first subject which will be noticed in the Report of the Majority. It is that which recommends that the plan of the work be entirely changed, and another substituted in its place.

Without discussing the merits of the plan proposed, which is unscientific and comparatively easy of accomplishment, it is respectfully submitted that the substitution of it would involve injustice to the memory of the Commissioner, if not a breach of good faith, unless it be demonstrated that his plan is clearly defective and insufficient for the object designed by the Legisla-

ture. The work would cease to be his, and become that of the Majority of the Commission—by the appropriation of his faithful labor, searching analysis, and tasteful condensation. His plan was set forth at the outset, and its examination solicited; and he was permitted to continue the work to its completion, according to that plan, without criticism or objection, although the Act of 1859, provides that “such action as shall seem proper to the Legislature may be taken” upon the portions of the work prepared and annually reported, “according to the plan and method adopted by him.”

But the plan is, in truth, an excellent one, and peculiarly appropriate. The Act provides for the preparation of “such a code of Statute Law as, if enacted, might, in connection with the portions of the Common Law that would be left unaltered, constitute the whole body of law in this State.” It was thus made the office of the Commissioner, to interweave his work with the Common Law. But what more approved treatise of the Common Law is there than Blackstone’s Commentaries? What arrangement of its topics so familiar to the Legal Profession, and even to lay-men, as his, which the Commissioner “borrowed” as he modestly, remarks? During the deliberations of the Commission, it was objected that the plan is too scientific for ordinary minds. Without at all conceding this to be so, the Commissioner doubtless believed, and properly, that his appointment called for a work of the highest scientific character—not a *popular* one. But whatever be the arrangement of such a work, a general index is a necessary and easy guide to its contents, and the same index would serve under the plan pursued by the Commissioner, and that proposed by the Commission. The important point is, that it contain all the law, and that it does contain all, except what is set forth in the Report of the Majority as omissions detected by them, is implied in the fact that their Book is to be composed of the matter in the Commissioner’s, “as altered and amended” by them.

The undersigned make no objection to the recommendation of the Majority; that certain topics in the Code shall form a separate volume, and concur with them in the necessity of appointing an Editor—not, however, to rearrange the work—but to collate the several parts as they may be amended by the Legislature, and “prepare a complete general index of the whole.” In the language of the late Commissioner—“The work cannot be committed to the press until it has received your sanction; and the finishing hand of an Editor will be needed to incorporate the additions and corrections in the body of the work, to number the sections and paragraphs for the purpose of reference, and reduce the several indexes to one table of contents.”

These preliminary matters being disposed of, the undersigned approach the heavy task of considering the voluminous “alterations and amendments” recommended by the Majority. And, at the outset, they protest against those which imply that the Commission was invested with power to introduce new

law—a power which it will be seen has been lavishly exercised by the Majority. This delicate power, involving the highest confidence, was entrusted to the Commissioner, who, as before remarked, was to be a person of extraordinary capabilities. It was done very cautiously, too. He was admonished, that “adherence to what is established, where the reasons for change are not decisive, should be a governing principle; but, at his discretion, regulated by this principle,” (and others laid down in the Act) “repeals and alterations of existing law, and additions to it, might be introduced.” The Act also contemplated that such repeals, alterations and additions, as he might suggest, should be first scrutinised by committees, according to the rules of the Legislature, before being acted on by that body. The “Reports of the Commissioner,” (*Reports and Resolutions of 1862*, p. 173,) not the preparation of a Code of its own, was referred to the Commission. And it is respectfully submitted that the true office of the Commission was to examine the Commissioner’s work, and report whether in its judgment his digest of the old law retained is correct, and his modifications and repeals of it, and suggestions of new law are judicious. Such is the plain import of the Resolution of reference. And to suppose that it conferred the power which has been assumed, would be to suppose that the Legislature intended new law introduced by the Commission, (in whose abilities it cannot be imagined that higher confidence was reposed than in the Commissioner’s,) to be acted on by them immediately, without the previous scrutiny to which his suggestions were to be subjected.

The alterations and amendments, then, may be classified, as follows :

I. Those which contain modifications of the statutes—substantial additions thereto—(*new law*)—or repeals of substantial parts thereof, which the Commissioner, in the discretion vested in him, did not think fit to recommend.

II. Those which restore statutory enactments, which the Commissioner has wisely recommended to be repealed or modified.

III. Those which reject new law, wisely recommended by the Commissioner.

IV. Those which mar the tasteful style and condensation of the work, by restoring the words of the statute, or otherwise changing those of the author.

V. Those consisting of matter, which is, in fact, already in the Book, or was noted by the Commissioner, and omitted in the *Addenda & Corrigenenda*.

VI. Those that point out omissions of words or matter which, in the judgment of the undersigned, should be retained—or changes that are rendered necessary by recent legislation.

To notice all would swell this Report into a volume. The undersigned will therefore confine themselves to a few in each class, and simply point

out the rest, and invite the examination of them by members for themselves:

I. On page 31,* paragraph 3, the duties of Constables are set forth in the execution of orders, &c., "relating to the trial of slaves." The Majority have added, after "slaves," "and persons of color." These words are not in the statute, and are therefore liable to the objection of being *new law* introduced by the Commission. Moreover it is submitted that they are uncalled for, as the effect would be the same without them.

In the fourth paragraph on the same page, the power of a constable in doing execution on a slave or free negro is stated. The word "Sheriff" instead of "Constable" is inserted by the Majority. This mars the symmetry and propriety of the existing law, the Constable, not the Sheriff, being the executive officer of the Justice's Court.

On page 32, paragraph 4, the Code states the reward provided by the existing law to persons who may be maimed in apprehending a runaway, or slave who is a fugitive from justice. The Majority have interpolated or "slave charged with any criminal offence," and struck out "or slave who is a fugitive from justice." And in the same paragraph they have substituted "distributees" for the word "heirs," which is used in the Statute, and followed in the Code.

On page 34, paragraph 3, the Code states, in accordance with the Statute, that a fine may be substituted for corporal punishment on the conviction of a free person of color. The majority add "in cases not capital," *new law*, and unnecessary, because death, not corporal punishment, is the penalty in capital cases.

On page 76, paragraph 6, the Code gives the *Constitutional* provision that the Governor shall not be re-eligible until after four years, and the Majority strike it out, thereby *altering the Constitution!*

On page 35, paragraph 4, the allowance of half the fine for trafficking with slaves, made to the informer by the existing law, is struck out by the majority, and struck out in like manner in almost every case in the Statutes where such allowance occurs. And in paragraph 6 of same page, the allowance of damages to the owner, for the unlawful beating or imprisonment of his slave, is struck out.

On page 106, paragraph 7, the Code follows the Statute as to the penalty of the Bond of the Tax Collector for St. Philip's and St. Michael's Parishes, which was established as lately as 1859. The Majority change it. So on page 117, paragraph 4, as to election day in Pickens District, established by Act of 1859.

* When only the latter part of a paragraph is printed on any given page, it is designated as paragraph I. in these references.

On page 304, the Majority propose to interpolate *new law* of a very important character, by making it penal for Railroad Companies to fail to furnish every passenger who purchases a ticket, with a comfortable seat throughout the entire journey for which it calls, or a supply of good drinking water for passengers, or to keep cars occupied by passengers well lighted at night, and subjecting them to a fine of \$1,000 for every offence.

Other amendments belonging to this class, occur at pages 26, par. 1; 28, par. 1; 32, par. 2 and 3; 33, par. 8; 35, par. 2, 3 and 6; 36, par. 4; 38, par. 1; 39, par. 3; 40, par. 2; 44, par. 4; 45, par. 5; 47, par. 1; 48, par. 2; 55, par. 3; 56, par. 5 and 6; 61, par. 3; 63, par. 3; 74, par. 6; 78, par. 10; 80, par. 4, 5 and 7; 82, par. 3 and 5; 94, par. 3; 99, par. 2; 102, par. 6; 103, par. 1; 106, par. 3 and 5; 115, par. 4; 116, par. 2 and 3; 117, par. 4; 123, par. 3; 124, par. 4; 127, par. 1.

II. On page 33, paragraph 9, as to the trial of slaves and free persons of color. According to the existing law, the consent of the Magistrate (Justice) is required when only a majority of the freeholders agree, not when they are unanimous. The Code modifies the law by making the concurrence of the Justice necessary in both cases. The Majority restore the provision of the Statute. It is submitted that the modification in the Code is proper.

Page 39, paragraph 4. The law against the intrusion of free negroes into the State. The Majority restore the statutory exception in favor of "Free American Indians, free Moors or Lascars"—properly omitted in the Code, *because those persons are not embraced in the prohibition and penalties of the Statute.*

On page 59, paragraph 5. Office to be regarded as vacant when the officer fails to furnish additional security required. The Majority restore the words of the Statute, "the original bond not to be cancelled, or at all impaired thereby"—properly omitted in the Code, because entirely unnecessary. The requirement contemplates *additional*, not *substituted* security.

The same remarks apply to page 60, paragraph 1.

On page 98, paragraph 6. One hundred copies of the Act and Resolutions of the General Assembly, to be subject to the order of the Governor. The Majority add the words of the Statute, "for interchange with other States." The Code properly leaves out the restriction as to the purpose for which they are to be used, because there were only thirty-one other States when the law was passed, and less than one-third of that number now.

On page 104, paragraph 1. Persons removing from the State without paying their taxes, although not yet payable, to be dealt with as defaulters. The Majority restore a proviso of the Statute excepting those who give security for payment at the appropriate time—a cumbrous provision very properly left out of the Code. It is only reasonable to require such persons to leave the money with an agent.

Other amendments belonging to this class occur at pages 34, paragraph 4; 40, par. 5; 95, par. 2; 126, par. 3.

III. On page 47, paragraph 1. Privilege from arrest in going to elections. The Code supplies a palpable defect in the law by providing for the prompt discharge of persons illegally arrested, without which the law is nugatory, and gives the power of discharge to the managers. The Majority annul the amendment, and leave the law as it is.

On page 93, paragraph 6. Penalty against Tax Collectors restricted by the Statute to the offence of failing to make returns. The Code extends it to the offence of not paying over moneys collected according to law. The Majority annul the amendment.

On page 121, paragraph 7. The Code provides, as new law, for surveys of lands according to old lines and actual possession, which shall be *prima facie* evidence of the right of possession. It is carefully guarded, calculated to prevent litigation, and if litigation ensue, to simplify the proceedings, present the real questions between the parties, and ensure justice. The Majority disapprove.

On page 131, paragraph 2. The Majority restore the provision of the existing law, empowering a Justice to hear and decide applications for the benefit of the Prison Board Acts, which is left out in the Code. Difficult questions often occur under these applications, which are beyond the capacity or learning of the general run of Justices. It is sufficient that the Clerks of Court possess the power.

And on the same page, paragraph 4, the Code restricts the appointment of Constables to one by each Justice, according to the Statute, but omits the proviso as to his appointment of Special Constables for particular occasions. The Majority restore the proviso. If there be good reasons for the general rule, the proviso is so loose as to render it nugatory.

Other amendments belonging to this class occur at pages 33, paragraph 9; 36, par. 4; 39, par. 4; 40, par. 5; 44, par. 4; 45, par. 5; 59, par. 5; 61, par. 1; 95, par. 2; 98, par. 6; 111, par. 2 and 3; 119, par. 5; 123, par. 2; 124, par. 4; 125, par. 3; 127, par. 3 and 5; 128, par. 5.

IV. On page 28, paragraph, 5. Unlawful meetings of negroes for religious worship. The Code expresses it, "before the rising of the sun." The Majority add the words of the Statute, "or after the going down thereof"—unnecessary, and therefore properly omitted. Before the rising of the sun embraces all the time after sun-set.

On page 60, paragraph 2. "The party" used in the Code, struck out, and the words of the Statute, "any such public officer," restored. They mean the same thing, and the former is in better style.

So, on page 63, paragraph 2—"Shall be," substituted for "is," in the Code, which properly uses the latter word, as it is declaring what is the law.

And on page 88, paragraph 8, the words "on or" unnecessarily interpolated.

On page 89, paragraphs 2 and 3. The Majority change the order of two paragraphs. The Code follows the arrangement of the existing laws, which is plainly the proper one.

On page 101, paragraph 8. The Majority change "begins" into "shall begin," when the Code is declaring what is the law. They also strike out "and the era dates from the first day of October, 1788," and insert "in every year," which is inappropriate for the same reason.

On page 103, paragraph 3, the Majority strike out the word "incompetency," which is entirely appropriate, and substitute for it "non-compliance." And in paragraph 6, on same page, they strike out assets "in his hands," and insert "which came into his hands," which means the same thing. And they add "if sufficient," which is superogatory, as that is the very import of the term asset—*assez*, enough.

Other amendments belonging to this class occur at pages 26, paragraph 8; 28, par. 5; 34, par. 3; 102, par. 4; 104, par. 1; 127, par. 4 and 5; 128, par. 2, 3, 4 and 7; 129, par. 2.

V. On page 26, paragraph 1. The Majority substitute "are punishable with death" for "amount to felony without *benefit of clergy*." A change became necessary when the Commissioner decided to recommend the abolishment of *benefit of clergy*, and he noted it in his copy of the work in the words "that amount to capital felonies," (a better phrase than that used by the majority) but omitted it in the *Addenda & Corrigenda*.

On page 64, paragraph 5. The amendment made by the Majority in relation to the salaries of "public officers on the civil list," is in the Code at its proper place, page 228. See *Addenda & Corrigenda*, page 745. The Faculty of the College do not fall under that designation.

On page 67, paragraph 1. As to census for apportioning Representatives in the Legislature. The Code had it "an enumeration, &c., shall be made in the year 1809, and in the course of every tenth year, &c.," following the language of the old Constitution. The Constitution was altered in 1861, after this part of the Code was printed, and the Commissioner noted the following amendment in his copy, but omitted it in the *Addenda & Corrigenda*, viz: "was made in the year 1859, and shall be made in the course, &c." This is exactly correct. The Majority amend the clause so that it shall read, "an enumeration, &c., shall be made in the year 1869, and in the course, &c."

On page 70, paragraph 4. Election day changed since this part of the Code was printed. The Majority note the change, and it is also noted in the Commissioner's copy.

On page 71. The Majority insert, after paragraph 2, a paragraph which is already in the Book at page 67, paragraph 5.

On page 88, paragraph 6. The Majority insert an enactment in relation to Reports of Railroad Companies, which was passed after this part of the Code was printed, but is noted in the *Addenda & Corrigenda*, to be printed in its proper place.

In like manner, on page 94, paragraph 5, the Majority insert a provision in relation to annuitants, which is in the Book, at page 96, paragraph 4.

Also on page 125, paragraph 2. The words, "in case of felonies," which are in the Book, for the same object, at page 126, paragraph 3.

VI. In this class all, except those rendered necessary by recent legislation, are of comparatively small importance.

On page 25, paragraph 2. Tax returns of free persons of color. After "free negroes," the words of the Statute "mulattoes and mestizoes," omitted in the Code, are restored. The omission was probably caused by the opinion that such persons are embraced in the term "free negroes." And, moreover, at page 33, the Code states that the terms "free negroes," and "persons of color," are to be deemed convertible. To prevent all uncertainty, however, it is perhaps better to restore the words.

On page 43, paragraph 1. Exception to the requirement of white men on plantations, extended to plantations whose owners reside in the vicinity, and regularly perform patrol duty, according to the Act of 1842, omitted in the Code.

On page 55, paragraph 11. Officers appointed by the Governor. "Registrar of Births, &c.," struck out. The office abolished since the Book was printed. The same remark applies to the amendments at pages 83, paragraph 9, and 90, paragraph 3; and on page 98, paragraph 8, as to Licenses to Itinerant Tradesmen.

On page 57, paragraph 2. Date of Official Bonds. Independence of the United States of America, changed to that of this State. The change rendered proper by the secession of the State from the United States, since the printing of the Book.

And on the same page, paragraph 5, the Code omits to state that the form of *probate* shall be endorsed on blanks for official bonds. The omission is supplied.

On page 58, paragraph 5. The Code requires that a surety shall be worth the amount of the bond. The words of the Statute, the "amount for which he offers himself," are restored.

On page 67, paragraph 3. Amended to correspond with the Constitution of 1861, established since this part of the Book was printed. And the same remark applies to the amendment on page 71, after paragraph 6.

On page 73, paragraph 6. Election of certain State officers. "Commissioner of Locations" struck out. Rendered proper by subsequent recommendation of the Commissioner to abolish that office.

On page 80, paragraph 9. Powers and duties of the Governor. He is President of the Board of Commissioners of the Deaf and Dumb, and the Blind. Omitted here, though it is stated at page 238, paragraph 1.

On page 104, paragraph 3. Marginal title, "capitation tax," inserted.

On same page, paragraph 3. "At the present session or hereafter," unnecessary, and properly struck out.

On page 129, paragraph 3. The form of bond on appeal from judgment of Justice's Court, omitted in Code. Omission supplied.

On the same page, paragraph 6. Jurisdiction in cases of trover and detinue given to the Board of Magistrates within the Parishes of St. Philip's and St. Michael's, to the extent of twenty dollars, "*between the inhabitants of the said Parishes.*" The words in *italics* omitted in the Code, but the opinion that they are implied, is probably correct.

This Report reaches only to the latter part of the Commissioner's first volume. It was the design of the undersigned that it should contain an examination and classification of all the "amendments and alterations" made by the Majority. But the time, since the last adjournment of the Commission, has been insufficient for the full accomplishment of their intention. It is believed that the remaining "amendments and alterations" are of the same general character as those herein noticed, and that enough has been brought to the view of the Legislature to show that the Majority have not been happy in apprehending the proper character and style of a Code, or the spirit of the distinguished author, whose work they have scrutinized with commendable industry.

If the Legislature think fit to postpone action on the subject, the undersigned will avail themselves of the opportunity to submit a Supplemental Report. Otherwise, they respectfully recommend the adoption of the following resolution:

Resolved, That the Code of the Statute Law of the State, prepared by the late Mr. Petigru, and the Reports of the Majority and Minority of the Commission on the same, be referred to an Editor, to be appointed by the Legislature, whose duty it shall be to supply the omissions mentioned in this Report and others of a like character in the remainder of the work, to incorporate the additions and corrections in the body of the same, to number the sections or paragraphs for the purpose of reference, and prepare a general index of the whole.

Respectfully submitted,

HENRY D. LESESNE,
WILLIAM WHALEY.

COLUMBIA, November 28, 1864.

At several preliminary meetings of the Commission, I expressed my approval of the plan of the Code, and its execution. I now concur generally in this Report, and recommend the adoption of the above resolution.

B. F. PÉRRY.

COLUMBIA, December 2, 1864.

NOTE.—During the examination of the Code, each member noted the changes that were determined on in his copy of the Book. The writer was hindered by illness from attending two meetings of the Commission, and the foregoing Report was prepared from the only copy of the Book which was accessible to him. It is now discovered that there are some discrepancies among the several copies. For example, the Chairman's does not contain the change on page 76, paragraph 16, above noticed, which occurs in two of the other copies.

The change on page 31, paragraph 4, noticed above under class I, belongs properly to class II.

Mr. Perry having signed this report, as above, each of the reports is now concurred in by three members—one by Messrs. Moses, Arthur and Williams—the other, by Messrs. Lesesne, Whaley and Perry. The remaining member of the Commission, Mr. Dawkins, is in favor of this report, or of the resolution appended thereto, but declines signing it for reasons which he will explain in his place.

Columbia, December 2, 1864.

NOTE.—One of the two members who noted the change on page 76, par. 6, explains that it was intimated to denote his individual recommendation, not the decision of the majority.

Columbia, December 3, 1864.

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